IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 590

3174 S#9
CHI-COR

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a corporation,

Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

WARREN NEWCOME,
Counsel for Petitioner,
275 E. Fourth St.,
St. Paul, Minn.

WILLIAM T. FARICY,
NELSON J. WILCOX,
Of Counsel,
400 West Madison St.,
Chicago, Ill.

SUBJECT INDEX.

TABLE OF CASES.

STATUTES.

IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. .....

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a corporation,

Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Chicago, St. Paul, Minneapolis & Omaha Railway Company respectfully shows to this Honorable Court:

*Summary Statement of Matter Involved.

Respondent sued in the United States District Court, District of Minnesota, under the Federal Employers' Lia-

*Respondent's intestate will be referred to as "Muldowney". References are to folios and pages of the printed record.

bility Act (35 Stat. 65, 66, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. A. Secs. 51-59), to recover damages for Muldowney's death in the course of his employment as a switchman by petitioner while both parties were engaged in interstate transportation (ff. 5-8, pp. 4-7; f. 48, p. 34).

Whether petitioner violated the Safety Appliance Act relating to automatic couplers (27 Stat. 531, 45 U. S. C. A. Sec. 2), and if so, whether such violation proximately caused Muldowney's death were the only issues submitted to the jury (ff. 279-284, pp. 204-207).

On appeal from the judgment entered on a jury verdict for respondent (f. 293, pp. 213, 214; f. 304-318, pp. 223-238), the Circuit Court of Appeals for the Eighth Circuit held that there was substantial evidence requiring submission of both issues to the jury (ff. 243-255, pp. 243-253), and on October 26, 1942, affirmed the judgment of the District Court (f. 255, pp. 253, 254). Petition for rehearing, seasonably filed (ff. 255-266, pp. 255-265), was denied November 14, 1942 (f. 266, p. 265). Petitioner seeks review by certiorari of the judgment of affirmance.

There was no eyewitness to the accident and circumstantial evidence was relied on to establish negligence and proximate cause.

Facts.

When fatally injured on March 6, 1941, Muldowney was engaged in a switching operation which involved the coupling of a switch engine tender (Exhibits "D", "E" and "F", pp. 41, 45, 53), to a Swift & Company refrigerator car (Exhibit "B", p. 31, coupler knuckle open; Exhibit "C", p. 33, coupler knuckle closed), on the north bound

main track in petitioner's Sioux City, Iowa, Twenty-second Street Yard (ff. 66, 67, pp. 49, 50).

On Exhibit "A" (p. 15), camera facing north, the north bound main track is at the extreme right hand or east side, the yard office immediately adjacent to the east, and Twenty-second Street (L. S. 1, Ex. A) is 315 feet south of the yard office. L. S. 2 on Exhibit "A" indicates the location of the south end of the refrigerator car (the most southerly car of a string of twenty-one cars), and is the approximate point of accident (ff. 63-67, pp. 47-50; ff. 78, 79, pp. 58-59). After coupling the switch engine tender to the refrigerataor car, it was the intention to pull the twenty-one cars southerly on the north bound main track (f. 67, p. 50).

The switch engine, headed south with the tender to the north and the front and rear headlights burning, entered the north bound main track south of Twenty-second Street and, on Muldowney's signal, backed northerly to make the coupling (ff. 129-132, pp. 95, 96). No stop was made until after the accident (f. 133, pp. 97, 98). Muldowney, holding a lighted lantern, stood on the footboard at the northwest corner of the backing tender (Exhibit "F", p. 53). As the tender passed them Foreman Schupp, standing at the west side of the track 215 feet south of the yard office (L. S. 3, Exhibit "A", p. 15), and Yardmaster Stickels, facing south and standing at the west side of the track approximately 20 feet south of the refrigerator car, saw Muldowney in that position (ff. 131, 132, p. 96; ff. 69-79, pp. 51-59; Ex. D, L. S. 4, p. 41; ff. 23, 24, pp. 17, 18). It was dark and signals were being given by lighted lanterns (f. 130, p. 95).

Engineer Larson from his seat box at the west side of the engine cab kept a lookout ahead in the direction of movement. The movement and stopping of the switch engine was governed exclusively by signals from Muldowney (C. L. 1, Ex. E, p. 45; ff. 131-139, pp. 95-102). From a point approximately 120 feet south of the refrigerator car the speed of the engine and tender did not exceed two to three miles per hour (ff. 132, 133, p. 97). When the north end of the moving tender was eight to twelve feet from the refrigerator car, Muldowney, from his position on the tender footboard, gave the engineer a lantern signal which indicated that everything was in readiness to make the coupling and that the tender should continue back for that purpose (ff. 132-137, pp. 96-100). Larson complied with that signal and the tender backed against the standing car (f. 133, p. 97).

When the engine and cars did not start ahead, or south, as expected, Stickels looked back, or north, and saw Muldowney's lighted lantern on the ground between the rails. He then discovered Muldowney, standing upright, facing northerly, crushed between the closed coupler knuckles of the refrigerator car and tender. His body was to the east of the center of the car coupler (ff. 24-27, pp. 18-20). There was a light coating of fresh snow on the tender footboard but no marks to indicate that Muldowney had slipped therefrom (f. 28, p. 21).

Immediately after the accident both coupler knuckles were found closed and the tender coupler and drawbar were to the east of the center (f. 26, p. 19, ff. 40, 41, p. 30; f. 47, p. 34; ff. 142-144, pp. 104, 105). Two witnesses testified that the car drawbar was centered (ff. 143, 144, p. 105;

ff. 180, 181, pp. 132, 133). There is no evidence to the contrary.

Irrespective of the alignment of the coupler drawbars, with both coupler knuckles closed, a coupling cannot be made (f. 195, p. 143; f. 224, p. 165). If drawbars are not in line with each other and only one coupler knuckle is open the coupling ordinarily will not make, but if both ~~coupled~~ couplers knuckles are open the coupling usually will make, even though the drawbars are not in alignment (ff. 224-226, pp. 165, 166). To make a coupling it is not necessary to have both drawbars centered. If they are in line with each other, even though off center, the coupling will make (ff. 250, 251, p. 184). The switch engine and tender weighed approximately ninety tons, the refrigerator car weighed approximately thirteen and one half tons, and the car drawbar weighed three hundred fifty pounds (f. 245, p. 180; f. 210, p. 154; f. 261, p. 191).

There was no mechanical defect in either coupler apparatus, nor was any condition found that could cause excessive lateral play in the drawbar of either coupler (ff. 180-182, pp. 132, 133; ff. 192, 193, pp. 141, 142; ff. 197-201, pp. 145-148; ff. 204-210, pp. 150-154; ff. 216-218, pp. 159, 160; ff. 227-228, pp. 167, 168; ff. 232, 233, p. 171; ff. 244-246, pp. 179, 180). The normal lateral play of the car drawbar was three inches. The car coupler apparatus permitted the draw bar to move from a center position to either side, a distance of one and one-half inches. In the absence of this play, cars coupled together could not pass around curves without danger of derailment or injury to the cars, nor be coupled together on curved track (ff. 206, 207, p. 152).

The tank coupler drawbar was oiled and could be easily moved from side to side by hand. The refrigerator car drawbar was not oiled, and, because of exposure to the elements, had become rusted, and required greater effort to move from side to side (f. 246, p. 180; f. 250, p. 183). If necessary Muldowney could have moved the tender drawbar to either side without leaving the tender footboard (f. 246, p. 180; ff. 253, 254, p. 186).

Muldowney sustained crushing injuries in the abdomen and back, which could only have been caused by a terrific impact (ff. 103, 104, pp. 76, 77).

After the accident, when the car and tender were stationary and separated twenty feet, Foreman Schupp opened the car coupler knuckle and the tender was back northerly to make a coupling. On the first attempt the coupling did not make. The car and tender were then separated twenty feet, and, while stationary, Schupp shoved the car drawbar east to line it up with the tender drawbar and opened the tender coupler knuckle. With both knuckles open, the tender again was backed northerly and the coupling made automatically. In shoving or lifting the car drawbar east Schupp may have stood in front of the car coupler facing the car (ff. 88-92, pp. 65-68).

Respondent introduced opinion evidence to the effect that the presence of Muldowney's body between the couplers could not have forced the drawbars out of alignment, if they were in alignment prior to the accident. The opinion testimony (a) assumed that the car drawbar was east of center after the accident; (b) rejected the weight of the tender and car as a factor; and (c) made no assumption respecting whether or not the knuckles were open or closed prior to the accident (ff. 108-113, pp. 80-83). The locker

room, lunch room and toilet facilities for the switchmen were located in the yard office. To reach the yard office from his location on the footboard of the moving tender, it would have been necessary for Muldowney to pass in front of the car coupler (ff. 253-255, pp. 186, 187).

The Circuit Court of Appeals held that proof of the foregoing facts or circumstances justified jury inferences: (1) that immediately prior to the accident the drawbars were so far out of alignment as to prevent automatic coupling, unless a man went between the car and tender and moved the car drawbar east to effect alignment; (2) that as he approached the car on the footboard of the moving tender, Muldowney discovered this condition, and walked or ran ahead to lift or shove the car drawbar east to effect alignment, when he was struck by the coupler of the moving tender and crushed between the couplers (ff. 243-255, pp. 243-253).

In its opinion the Circuit Court of Appeals fails to mention or consider the material and uncontradicted evidence respecting the signal given by Muldowney when the moving tender was eight to twelve feet from the car and respecting his ability to shift the tender drawbar if necessary to effect alignment without leaving the tender footboard. These omissions were pointed out to that court in petitioner's application for rehearing (pp. 255-258).

Jurisdiction.

(1) This court has jurisdiction to review the decision and judgment of the Circuit Court of Appeals by virtue of (a) Section 240 of the Judicial Code as amended, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a); and (b) the nature

of the case (a suit under the Federal Employers' Liability Act, 35 Stat. 65, 66, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. A. Secs. 51-59, based on an alleged violation of the Safety Appliance Act relating to automatic couplers. 27 Stat. 531, 45 U. S. C. A. Sec. 2) and the rulings below (ff. 263, 264, p. 193; ff. 287-288, p. 210; ff. 309, 310, pp. 227, 228; ff. 296-297, pp. 215, 216; f. 303, p. 223).

(2) The date of the judgment to be reviewed is October 26, 1942. Rehearing was denied November 14, 1942. The date of this application for certiorari will be shown by the Clerk's stamp on the cover hereof.

(3) Cases believed to sustain jurisdiction are:

Forsyth v. Hammond, 166 U. S. 506,

St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 276, 277,

St. Louis-San Francisco Railway Co. v. Mills, 271 U. S. 344, 346,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,

Gay v. Ruff, 292 U. S. 25.

Questions Presented.

(1) Was there substantial evidence which justified the jury in finding that petitioner violated the Safety Appliance Act relating to automatic couplers?

(2) Was there substantial evidence from which the jury could find that a violation of that Act was the proximate cause of death or does the evidence leave the cause of death in the realm of speculation and conjecture and is reversal required under the doctrine of *Chicago, M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472, and *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333?

(3) In order to return a verdict for respondent was the jury required to draw inferences from inferences, base presumption on presumption, adopt inferences inconsistent with proven circumstances and enter the realm of speculation and conjecture, contrary to the rule of *United States v. Ross*, 92 U. S. 281, *Manning v. Insurance Co.*, 100 U. S. 693, *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, and *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333?

The decision of the Circuit Court of Appeals appears in the record on pages 242 to 253, inclusive.

Reasons Relied On For Allowance of Writ.

1. In holding that there was substantial evidence of negligence, the Circuit Court of Appeals decided a federal question of substance in a way in conflict with applicable decisions of this court.

Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,
Patton v. Texas & Pacific Ry. Co., 179 U. S. 658.

(2) In holding that there was substantial evidence of proximate cause, the Circuit Court of Appeals decided a federal question of substance in a way in conflict with applicable decisions of this court.

United States v. Ross, 92 U. S. 281,
Manning v. Insurance Co., 100 U. S. 693,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,
New York Cent. R. Co. v. Ambrose, 280 U. S. 486,
Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351,
Atchison, T. & S. F. Ry. Co. v. Saxon, 284 U. S. 458,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,
Northwestern Pac. Ry. Co. v. Bobo, 290 U. S. 499.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on its docket and that said decision and judgment of said Appellate Court be reversed by this Honorable Court and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY,
By WARREN NEWCOME,
Counsel for Petitioner,
275 E. 4th Street,
St. Paul, Minnesota.

WILLIAM T. FARICY,
NELSON J. WILCOX,
Of Counsel,
400 W. Madison St.,
Chicago, Illinois.